

1893

Rights, Duties, and Liabilities of Trustees

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RIGHTS, DUTIES AND LIABILITIES OF TRUSTEES.

Of all relations that can be created between persons in the various phases of life, none is of more importance than that of trustee and beneficiary. It is important because it embraces so many classes of persons, as for example; guardian and ward, committee and lunatic, attorney and client, agents, factors, commission merchants, bailees, assignees in bankruptcy and insolvency and in voluntary general assignments. This is but a small portion of the class of persons to which the relation applies and to which the rules governing trustee and cestui que trustare applicable.

As to the origin of trusts, it may be said that they took their inception from the civil law. It was the rule of that law that the testator could not appoint a person to take his property after the death of the first devisee but that he might do so if the first devisee died before he was able to make a will of his property. So that according to the civil law, the only method the testator could adopt to carry out his intention as to the disposition of his property after his death was to devise his property with certain directions as to its disposition by the first devisee. So that it rested entirely upon the honesty and integrity of the devisee whether the wish of the testator should be carried out. In fact, it was called "infirum" or "precarium" because it was so

(2).

uncertain and doubtful whether the wish of the testator should be executed. The person named by the testator to take property from the devisee had an equitable but no legal right to the property.

But this was a very imperfect system and as complaints were frequently made to Emperor Augustus, he appointed a praetor who had full power to give adequate relief in all such cases.

The next step in the progress of uses was their introduction into operation in England by the clergy to avoid the statutes of mortmain, which statutes forbid the accumulation of lands by religious bodies and corporations. The practice of the clergy was to have the land conveyed to some person for the use of the church, so that the legal title was in that person and the beneficial title was in the church.

Much mischief and a great many frauds were the inevitable result of this system some of which are the following:-

First:-As one of the punishments for treason was forfeiture of estate, as soon as the person committed treason he would convey his lands to a third person for the use of his family, thus preventing their forfeiture.

Second:-A person who had a debt to collect out of the lands of another knew not against whom to bring his action, for the legal title was in one person and the equitable title in another person.

Third:-The wife was defrauded of her dower and the husband of his curtesy.

Fourth:-The lord knew not to whom to look for his feudal services and the king lost his income in revenues.

Fifth:-The poor tenant was deprived of his lease as soon as the land which he leased was conveyed to uses.

These are but a few of the many inconveniences thus occasioned by placing the legal title in one person and the equitable title in another person. Therefore, to avoid this, statutes were passed culminating in the Statute of Uses 27 Henry VIII C 10, which after reciting the many inconveniences previously mentioned, provides that, "when any person shall be seized of lands, tenements or hereditaments, etc. to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, or years, or otherwise, shall from thenceforth stand and be possessed of the lands, tenements and hereditaments etc., of and in like estates as they have in the use, trust, or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in the same quality, manner, form and condition, as they had before in the use."

The Statute thus "executes the use" as it is termed, transferring the possession to the use and the use into possession and the cestui que use is thereby the complete owner as well in equity as in law.

But the Statute was very defective and failed to right the wrongs which it was passed to remedy in four cases which are First:-At common law a use could not be limited on a use and as the second use was void, the statute did not affect it. To

illustrate this suppose X held an estate to the use of Y in trust for Z. Here the statute only executed the first use and divested X of his legal estate and vested it in Y. As the second use i.e. the use limited upon the first use was void, as soon as the Statute executed the first use and vested the legal title in Y, Z immediately became the owner of the equitable title.

Second:-The word seized as mentioned in the statutes, excluded from the operation of the statute a term of years and other chattel interests whereof the termor was not seized but only possessed because in law no person can be seized of such an estate.

Third:-The Statute did not apply where the first taker had any active duties to perform; it applied only where the duties of the first taker were passive.

Fourth:-The Statute did not apply where personal chattels were conveyed to one person for the use of another.

Thus it can be seen that the Statute of Uses drafted by men of great eminence and learning, and upon which much labor and ingenuity were exercised, failed in a large part to accomplish its purpose, partly on account of the narrowness of the statute itself and partly on account of the technical interpretation put upon it by the courts. The statute could only apply to passive uses in lands where the legal title upon which the use was limited was a freehold estate.

In the four cases above mentioned the statute did not apply

and the only remedy the cestui que use had to compel the performance of the use was to resort to the Court of Chancery with a subpoena as in cases arising before the passage of the statute and the Court compelled performance under the name of trusts.

After the passage of the statute of Uses the cestui que Use was called the cestui que trust and the feofee to uses the trustee.

Under this head of trusts has grown up a mighty system and none of the inconveniences which the statute of Henry VIII was passed to prevent now arise. That statute has never been repealed in England and is still in force in many of the states of the United States. In those states where the statute is still enforced except in the four cases above enumerated, the statute still "executes the use". In fact, legislation in this country has gone so far as to make provision for their creation and regulation but Courts of Equity or common law courts with equity powers have exclusive jurisdiction of trusts.

The next subject that I will take up is the general nature of the trust relation with reference to the trustee and cestui que trust including the rights, duties and liabilities of the trustee.

From the earliest time the relation of trustee and beneficiary has always been considered as a sacred one, requiring the greatest honesty and good faith because the trustee standing in a fiduciary and confidential relation to the cestui que trust, and in many cases having charge of extensive and valuable trust estates, are placed in such a position as to be open to temptation. In England, the relation is considered as of such sacred character that the trustee

is not allowed any compensation for his labor and services while acting in that capacity because they held that by giving him compensation, he would be placed in a position opposed to his duty and would soon forget the sacredness of his trust.

The principles that apply to trusts of real estate apply equally well to personal property and therefore the definition of a use given by Lord Coke, a term by which a trust was known before the Statute of uses, and quoted in a great many text books and treatises on Trusts may be given, "A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which the cestui que trust has no remedy but by subpoena in chancery."

There are many divisions of trusts but with reference to their creation trusts are either express or implied.

Express trusts are those that are created by some instrument in writing pointing out the property that is to be the subject of the trust, also the trustees, and sometimes containing directions as to the management of the trust.

Implied trusts are those which arise from implication of law out of the transactions of the parties. Implied trusts are again divided into resulting and constructive trusts.

Mr. Perry in his work on "Trusts" thus defines resulting trusts: "Resulting trusts are trusts that the courts presume to arise out of the transactions of the parties, as if one man pays the purchase price for an estate and the deed is taken in the name of another.

Courts presume that a trust is intended for the person who pays the money".

Of constructive trusts the same author says:- "A constructive trust is one that arises when a person clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be an advantage for the cestui que trust or a constructive trust" I will put aside implied trusts and treat exclusively of express trusts having particular reference to the general rights, duties and liabilities of trustees.

In all cases of express trusts, there must be an acceptance either expressed or implied before the trustee can enter upon his duties. The best method of accepting the trust and the one generally adopted is for the trustee to sign the trust deed(a). But an acceptance may be presumed from the acts of the trustee as if he should take possession of the property and enter upon his duties as trustee and in such a case he will render himself as liable as if he had signed the trust deed.

Flint v. Clinton Co. and Trustees(b) was the case of an assignment to a trustee of all the property of a corporation in trust for the benefit of all their creditors. The trustee took possession of all the property and paid therefrom expenses that had been incurred by him and certain taxes imposed on the property of the corporation. The assignee did not execute the deed of assignment by affixing his signature thereto, nor did it contain any provision for that purpose. Objection was taken to the proceeding under the

(a) Patterson v. Johnson 113 Ill. 559.

(b) Flint v. Clinton Co. and Trustees 12 New Hampshire 430.

assignment and also that the deed of assignment was not executed by the assignee. Gilchrist, J. in delivering the opinion of the court said:-

"It has been settled that when a trustee has interfered in the fulfillment of a trust, he binds himself to its performance even when he is made a party to the deed and has omitted to execute it".

When an express trust has been created the powers of the trustee are either General or Special; the former are such as by construction of law are incident to the office of trustee; the latter such as are conferred by the settlor himself by express provision in the instrument creating the trust(a).

I will confine myself to the general powers, duties and liabilities of trustees in express trusts and this will necessarily involve the corresponding rights and remedies of the cestui que trust.

In this connection the general powers of trustees in law must be distinguished from the general powers of trustees in equity. In law, the trustee can exercise all those powers that pertain to a legal estate because he is the legal owner, while in equity, the cestui que trust is the absolute owner and the question always is, how far can the trustee deal with the estate without rendering himself liable in a court of equity.

When a simple or passive trust is created, the trustee can only exercise dominion over the estate with the consent of the cestui que trust but when the trustee has special duties to perform, he

(a). Lewin on Trusts p. 640.

will be invested with power over the estate to the extent of those duties, which the trustee must strictly pursue. But there is an exception when the trustee must exercise the discretionary power of an absolute owner in a case where unless the trustee uses such discretionary power, the trust estate might be injured. In certain cases it might ^{not} be possible to obtain the sanction of the beneficiary to an act, or possibly it may only be had with great inconvenience; or perhaps there will not be sufficient time to make application to the court for instruction and if that were possible, it might be attended with great expense to the trust estate. In such cases, if the trustee went ahead and acted with a wise discretion and absolute good faith, he would be protected. But if the trustee is ever in doubt and the circumstances permit, he may give notice to the cestui que trust that he is going to act in a particular way and if the cestui que trust does not object and allows the trustee to act, the court cannot hold the trustee liable. Also, if the circumstances permit and the trust estate is not in danger of immediate injury, the trustee should apply to the court for instructions which he must strictly follow or he will render himself liable.

The first general duty of the trustee in carrying the trust into execution, is to conform strictly to the directions contained in the trust instrument. Concerning this Mr. Pomeroy in his work on Equity Jurisprudence (#1062) says:-

"This is in fact the corner stone upon which all other duties rest, the source from which all other duties take their origin."

If the instrument is a deed or will, the instrument must be

strictly followed, and if not strictly followed, the cestui que trust can hold the trustee for any loss that may arise. In the case of executors, administrators, guardians, directors of corporations, etc. the statutes generally prescribe the rule of their conduct and these statutes must be strictly followed at the peril of the trustee either for the non-compliance or compliance in a defective manner.

It has been held that under a power of sale contained in a will, the executors are not authorized to dispose of their testators real estate for the purpose of forming a mining corporation, and to receive stock of the corporation in payment therefore(a). It has also been held that a sale and conveyance by executors without an order of the probate court, under a will devising property to them in trust, but not authorizing any sale of the realty, otherwise than by a direction to pay the debts of the testator, is void, and passes no title to the purchaser(b).

But as before stated, the trustee may have an implied discretion subject to the control of a court of equity which discretion must be exercised in a reasonable manner. Mr. Justice Mulkey in delivering the opinion of the court in the case of *Starr v Moulton* in which a trustee used discretionary power said:-

"When a trustee has acted in good faith in a matter pertaining to the trust, and it is evident from the instrument creating the trust that it was intended to clothe him with

large discretionary powers in the discharge of his duty, and

(a) *Adair v Brimmer* 74 N.Y. 539.

(b) *Wise v Den*. 85 Cal. 391.

it does not clearly appear that he has transcended them, courts of equity are not inclined to disturb and unsettle an important business transaction thus entered into by him, to the detriment of third parties who have acted in equally good faith with himself"(a).

As a result of this general duty of strictly following the trust, the trustee should not be allowed to set up an adverse title in himself. Having accepted the trust for the benefit of the beneficiary, the trustee is estopped from setting up an adverse title in himself. This doctrine has been upheld because a contrary rule would render it extremely dangerous to entrust property to another and would in a great many cases be the means of allowing a dishonest trustee to make large profits by violating the trust.

A trustee upon entering upon his duties should take an account of all property coming into his hands, and also during the continuance of the trust, he should keep clear and accurate accounts of all transactions entered into by him and at the termination of the trust he should render a complete final account. In this connection in order to enable him to render accurate accounts, he should not mingle trust property with his own individual property but should keep each separate and distinct. When a deposit is made in a bank, it should be entered to the account of the trust estate and not to the account of the trustee. The accounts of the trustee should be open to the inspection of the beneficiary and if the trustee refuses to allow the beneficiary to examine his accounts (a). *Starr v Moulton* 97 Ill.525.

counts, the beneficiary can seek relief in a court of equity. A failure to keep clear and accurate accounts on the part of the trustee raises presumptions of fraud against him and may subject him to pecuniary loss by rendering him liable to pay interest or chargeable with moneys received and not duly accounted for.

It has been held that when a guardian keeps no account, the general rule is that he will not be allowed his commissions which are intended as compensation for the proper discharge of his duties because the presumptions are against the guardian.(a). Some cases have gone so far as to hold that if the trustee fails to account because of ~~negligence~~ and not because of any intent to defraud, he can only be chargeable with simple interest but if the omission is willful, compound interest can be charged(b).

If after having accented the trust, the trustee is in doubt as to how the trust should be executed or as to the interpretation of any part of the instrument, he should apply to a court of equity for instructions at the expense of the trust estate. After he has received the instructions of the court, he must carry them out very carefully and if he does so, he will relieve himself from liability.

The trustee should take possession of the trust estate and if necessary should insure the property and use every means to protect the property while the trust continues. In managing trust property, a trustee must use as much care as prudent men ordinarily adopt in their own business-more cannot be required of them.

(a). Topping v Windley 99 North Carolina 4.

(b). Adams v Lambard 80 Cal. 426.

Lathrop v Smalley 23 N.J. Equity 192.

State v Howarth 48 Conn. 207.

Brewer, J. in delivering the opinion of the court in the case of *Monroe v Commissioners of Saline Co.* (a). said:-

"A trustee is not an insurer. He is not absolutely bound for the results of his actions. He must exercise the highest good faith. He may not speculate with the property placed in his hands. He may not acquire an interest adverse to his trust. He is bound to exercise care and diligence as a man of prudence would in his own affairs. Having done all this he is not bound for mere error or mistake. A trustee to loan may loan on security which proves insufficient or the title to which fails, a trustee to sell may sell at a price below that which might have been obtained but if he has acted in good faith, with reasonable diligence and upon the advice of competent counsel, he is free from personal responsibility. Any other rule would cast upon the trustee a burden which no man would assume."

This is a very clear, accurate and concise statement of the rule which it would be well for all trustees to follow.

The next duty of the trustee after having taken possession of the trust property is to convert such securities as are not legal investments. He should exercise a sound discretion and sell in such a manner and at such a time as to realize the largest price in the shortest time. Mr. Perry in his work on "Trusts" says that:-
 "The circumstances of each case should govern and that the trustee should use a reasonable discretion in getting in the choses in (a). *Monroe v Commissioners of Saline Co.*

action of the testator and in disposing of the testators property,(a)

As personal securities are not recognized as good investments, such securities should be disposed of even though the investment had been made by the testator himself. It would be a very dangerous ^{rule} for the trustee to follow to suffer any of the trust estate unnecessarily to remain outstanding on improper securities.

Hill on Trustees says:-

"Thus it is settled to be the duty of executors and trustees to call in any part of the trust funds which they may outstanding on mere personal securities although no specific direction for that purpose is contained in the will"(b).

The trustee after having converted improper securities into proper securities, should see that the proceeds are properly deposited. If the bank in which the trust funds are deposited fails, and it can be shown that the trustee acted in good faith and did not allow the funds to remain in the bank uninvested for an unreasonable length of time, then he will be protected and cannot be rendered liable(c) In every case where the trustee makes deposits of trust funds, the deposit should be made in the name of the trust estate and the trustee should be very particular, as was before said, not to mix trust funds with his own otherwise he will be made liable for any loss or gain that may occur. It was said in

Lukens Appeal:-

(a). Perry on Trusts #439.

(b). Hill on Trustees page 582.

(c). Rowth v Howell 3 Vesey 565.

"It is wrong for a guardian to invest the ward's money in stock in his own name and if he does equity will give the ward the right to the stock if it rose in value and if it fell make the guardian pay legal interest"(a).

After the property has been converted into cash, the next duty of the trustee is to make the proper investments and of this I will now treat. Any direction in the trust instrument as to the manner of investment should be carefully carried out so far as possible, and for any loss arising therefrom the trustee will not be liable. As to the rule in England, it was formerly the habit to direct that money that was in the possession of the court to invest should be invested in 3½ per cent annuities and then it afterwards became the duty of trustees to invest trust funds in those securities. But Acts of Parliament, afterwards passed, permitted trustees to invest in real securities in any part of the United Kingdom, and Bank of England, or Bank of Ireland or East India stock: unless such investments are expressly forbidden by the trust instrument. It is also the rule in England as well as in the United States, that a trustee cannot invest in personal securities and of course it would be improper for him to use trust funds in trade or speculation. It has been held in England that money lent on a promissory note is not a good investment (b): the same has been held in the United States in the case of *Clark v Garfield* in which Judge Hoar said:-

"But the facts show that the guardian invested a considerable sum belonging to his ward's estate in a note of his son which he
(a) *Lukens Appeal*. 7 Sargents and Watts (Pa) 48.
(b) *Walker v Symonds* 3 Swanston (Eng. Chancery) 81.

held and was wholly unsecured. In payment of this note he took a note of a manufacturing firm, who were at that time in perfectly good credit but without taking any other security, not even the endorsement or guarantee of the son from whom he received it. The question is, was this the exercise of a sound discretion? We have no doubt that it was not; and no case has been cited in which such an investment was ever sanctioned by the court. We think that to allow it would furnish a precedent of the most dangerous character and would open a wide door for fraud. Such a note would not be taken by any bank of discount, much less than by any savings bank*(a).

The Judge then goes on to say that there may be exceptional cases where the peculiar circumstances might justify the taking of personal security. It is likewise held in England and many of the United States including New York and Pennsylvania that trust funds cannot be invested in the stock of private corporations while the contrary rule is maintained in Massachusetts.

In the case of *King v Talbot*, investments were made by a trustee in the stock of the Delaware and Hudson R.R., New York and Harlem R.R., and a couple other railroads, and also in the stock of the Bank of Commerce and it was decided that the trustee was not at liberty to make such investments and that the plaintiff, the beneficiary, was not bound to accept those stocks, as, and for his legacy, or the investment thereof (b).

(a) *Clark v Carfield* 8 Allen 428.

(b) *King v Talbot* 40 N.Y. 76.

Hemphill's appeal 6 Harris (Pa) 303.

The Massachusetts rule is clearly laid down in Harvard College

v Amory in which Judge Putnam said:-

"All that can be required of a trustee is, that he should conduct himself faithfully and exercise a sound discretion"(a).

Again in the case of Lovell v Minot, following the decision in the case of Harvard College v Amory held that a loan made by a guardian upon the promissory note of the borrower payable in one year with interest, secured by a pledge of shares in a manufacturing corporation, the amount of the loan being about three-quarters of the par value of the shares, and less than three quarters of the market value, was a good investment made with sound discretion; and though the borrower failed before the note fell due, and the shares fell in value below the amount of the note, the guardian was held not to be responsible for the loss(b).

First mortgages on real estate are considered proper investments for trustees in England, and in all of the States of the United States, and in both countries it is expressly authorized and regulated by statute. The rule in New York is found in King v Talbot which is that a trustee holding funds for investment must invest in government and real estate securities. Any other investment would be a breach of duty and the trustee would be personally liable(c).

Investments in second mortgages and other subsequent securities would be at the trustee's own peril.(d).

(a) Harvard College v Amory. 9 Pickering 446.

(c) King v Talbot 40 N.Y.76

(b) Lovell v Minot 20 Pickering 116

(d) Gilmore v Suttle 32 N.J.Eq.611.

Trustees may always invest in the governmental securities of the state under whose jurisdiction they are, and in those of the United States; and perhaps an investment in the public securities of other states of the Union, of which the credit is firmly established, may be permitted; but investments in foreign securities are a violation of the trustee's duty if carried to any greater extent than this. (a).

If the beneficiary is competent to bind himself, his consent to an investment which otherwise would be improper will relieve the trustee from all liability for loss that may arise. It was held in *Sherman v Parish* that a married woman may acquiesce in an unauthorized investment of trust property given to her sole and separate use, so as to bar her right of action against the trustee (b).

Sometimes the trust instrument contains directions as to investments of trust funds but the directions are very general and do not prescribe specifically the method of investment; in such a case the trustee must invest in those securities that are sanctioned by the court.

A trustee should invest trust funds in his hands within a reasonable time and if he neglects to do so he may be charged with interest and should any loss occur, the cestui que trust may recover it from the trustee. It was held in *Handly v Snodgrass* that where a will directed the estate to be put out at interest and the executor refused to do so, that he was to be considered a borrower and (a). *Pomeroy's Equity Jurisprudence*. #1074.
(b). *Sherman v Parish* 53 N.Y. 483.

and annually charged with interest(a).

As to what will be considered a reasonable time, the circumstances of each case will govern. A year has been held sufficient time within which for the trustee to make investments in United States stock(b). The United States Supreme Court has held that investments made of a trust fund, left with a banker within three months was within a reasonable time and that the trustee would be charged with any loss by the failure of the bank after that time.(c). In some cases six months have been allowed as a reasonable time, but when the trustees make no effort to invest the money, they may be charged with interest for longer than six months. Judge Knox in Worrell's Appeal said:-

"We have in several recent cases held that, ordinarily, six months should be allowed for the purpose of investment(d).

But later in Witmer's Appeal(e) Woodward J. said in delivering the opinion of the court after quoting the above words of Judge Knox:-

"From subsequent decisions however, (i.e. subsequent to Worrell's Appeal) it would seem that the time should be such as the circumstances of each particular case would show to be reasonable"

Thus it may be seen that the time within which an investment may be made varies with the circumstances of each case and for that

(a) Handly v Snodgrass 9 Leigh(Va)484
 (b) Cogswell v Cogswell 2 Edwards Chancery 231.
 (c) Barney v Saunders 16 Howard(U.S.)535.
 (d) Worrell's Appeal 11 Harris(Pa)44
 (e) Witmer's Appeal 87 Pa State 120.

reason no definite rule on the subject can be laid down.

Upon parting with the money in making investments, the trustee must see to it that the security is forthcoming and loss occasioned through his negligence, in not obtaining the security must be borne by him(a).

If a trustee retains trust funds in his hands that he should have invested, he will be charged with interest. It has been held that if a trustee negligently suffers the trust money to lie idle he is chargeable with simple interest while if he converts the trust money to his own use or employs it in his business or trade he is chargeable with compound interest(b).

It has also been held that an accountant not having kept the money of the estate separate from his own was chargeable with interest on the balance in his hands(c).

It has been held that when an assignee, a member of a private banking firm, mixed trust money with his own, depositing them in his own ~~name~~ and with his banking house and received interest upon the deposit, he was liable to the estate for interest.(d).

In Norris's Appeal Judge Paxton said:-

"It is a well settled rule

that where a trustee speculates with trust funds he may be held to profits or interests at the option of the cestui que trust. Profits if the investment has been successful

and interest if it has been disastrous. In no event will

(a).Coghill v Boyd 77 Va.450.

(b).Schieffelin v Stewart/Johnsons Ch.620.

(c).Wistars Appeal 54 Pa State 60

(d).Hess's Appeal 68 Pa.State 454.

the trustee be allowed to make profits out of the trust fund.

The law holds out no inducements to trustees so to misapply the estate. He may lose but he cannot make by so doing.

It is equally clear that where the trust funds can be traced into the purchase of any particular stock the latter should belong to the estate, if the cestui que trust so elect"(a).

If the trustee is directed by the trust instrument to invest in particular stock, and neglects to do so, the cestui que trust has his election to take the money and legal interest thereon, or so many shares of stock as the money would have purchased at the time when the investment ought to have been made and the dividends on the same(b). It seems that in some cases the trustee can be charged with compound interest as where he converts the trust money to his own use or employs it in his trade or business. Also where the trustee is directed to make an investment and accumulate the income and he neglects or refuses to do so, this seems to be the holding of all the authorities. It was held in McKnight v Walsh and a number of other cases that if the trustee wrongfully withholds money as a commission, he may be made to pay compound interest(c).

A trustee cannot of his own accord renounce his trust after having once accepted it. The only way in which a trustee can be discharged is by application to a court of Equity or agreement between all parties interested in the estate if they are capable of

(A)Norris's Appeal 71 Pa State 125.

Hart v Ten Eyck 2 Johnson's Ch. 62

Tunton v White 15 Vesey 432

(b).Perry on Trusts 469.

(c).Mc.Knight v Walsh 23 N.J.Equity 136.

giving their consent or by a clause to that effect contained in the trust instrument(a).

While the trust continues and before the trustee is discharged the cestui que trust can compel him to perform the trust if he refuses to do so, by filing a bill against him in the court of equity. If a trustee act in good faith the court will treat him more leniently than if he acted otherwise. In all cases he must exercise care and judgement and he cannot excuse himself on the ground that he did not possess them.(b). In *Crabb v Young*, Rugeley C.J. said:-

But while the trustees are thus held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears that they acted in good faith and if no improper motive can be attributed to them, the court have even excused an apparent breach of trust unless the negligence is very gross(c).

A trustee cannot delegate his power or authority, his office being one of personal confidence and if he should do so, he would be responsible to the cestui que trust(d). He may however employ certain persons to perform ministerial duties. But a trustee can never delegate his discretion for it is generally because of the trustee's good judgement and discretion that he is appointed. A Trustee may employ Agents, clerks, brokers, attorneys and such other persons that it is necessary to employ in protecting, taking care of and disposing of the property. It has been held that an adminis-

(a). *Bispham's Equity* p 181-182.

(b). *Hun v Cary* 82 N.Y. 65.

(c). *Crabb v Young* 92 N.Y. 66

(d). *Seeley v Hill* 40 Wisconsin 473

trator can appoint an Agent to do particular acts. Thus he may employ an attorney or an auctioneer to sell goods which he is authorized by court to sell at public sale; or when he is authorized to sell at private sale, he may appoint an agent to negotiate the sale, within the limits fixed by the court, which he may approve and report to the court for ratification(a).

When property is conveyed to several in trust they are co-trustees and form a collective trust and must act jointly. One cannot act without the others joining with him and if one is incapable of acting or refuses to do so, the others cannot proceed except upon application to the court(b). Mr. Hill in his work on Trustees says:-

"Trustees cannot act separately, but they must all join in any lease, sale, or other disposition of the trust property and also in receipts for money payable to them, in respect of their office"(c).

But this is in the absence of any other method of conducting the business of the trust contained in the trust instrument. That instrument may provide that transactions pertaining to the trust shall be carried on according to the will of the majority, in which case the minority trustees would have to submit.

I will now take up the liability of co-trustees. As a general proposition a trustee will not be accountable for acts or defaults of co-trustees in the absence of any negligence, connivance, or

- (a). Lewis v Reed 11 Indiana 239.
- (b). Latrobe v Tiernan 2 Md. Ch 474.
- (c). Hill on Trustees p 305

wrong on his part. This rule was first laid down in the case of *Townley v Sherborne* in which it was held:-

"That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his co-trustees shall not be compelled by the court of chancery to answer for the receipts of him so dying or decayed unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust"

The reasoning upon which this is based is that by law co-trustees are either joint tenants or tenants in common and by law every one may receive either all or so much of the profits as he shall come by. It is no breach of the trust to permit one of the trustees to receive all. Further, sometimes trustees are appointed out of other respects than to be troubled with the receipt of the profits. But his lordship and his judges did resolve:

"That if upon the proof or circumstances, the court should be satisfied that there had been any "dolus malus" or any evil practice, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing" (a).

When co-trustees join in a receipt, they should each be liable but when it can be shown that a trustee received no part of the money and only joined in the receipt for conformity, then he will not be liable. The burden of proof is upon the party signing and not receiving any part of the money to show that he signed only for (a). *Townley v Sherborne* 3 Leading Cases in Equity 718.

conformity and that he received no part of the money. The receipt is prima facie evidence of a receipt by all, and at law is conclusive evidence and estops the trustee from denying that he received the money. But in Equity, the rule is different, as equity does not favor estoppels and will look into the justice and equity of the matter and render a decree in accordance with the facts(a).

But although a trustee may sign a receipt not having received any part of the money and not be liable, yet if he is negligent and allows a trustee whom he knows is irresponsible to receive the money, he will be answerable(b). Mr Story in his work on Equity says

"A trustee is to act in relation to the trust property with reasonable diligence and in cases of joint trust with discretion and vigilance, with respect to the approbation of and acquiescence in, the acts of co-trustees; for if he should deliver over the whole management to the others, and betray supine indifference or gross negligence in regard to the interests of the cestui que trust, he will be responsible(c).

In this connection a distinction is made between co-trustees generally and co-executors. While cotrustees may not be liable for money which they did not receive although they signed the receipt for it, yet coexecutors are always liable if they join in a receipt. The reason is that the cotrustees have a joint power and must join in their acts while coexecutors have a several power over the estate. Each executor has an independent right over the

(a) Perry on Trusts #416.

(b) State of Ohio v Guilford 15 Ohio 493.

(c) Story's Equity Jurisprudence.

personal estate of the testator; he can sell it, and give receipts in his own name, and it would be an unmeaning act for the co-executor to sign a receipt when he was not to be bound by it, and so it has been held that if a coexecutor signs a receipt for money, he will be held though he receive none of it(a).

Trustees can make no profit out of this office and this has been carried so far in England as to hold that a trustee could receive no compensation for his services. Trustees very often have in their charge estates of defenceless women and infants and it would be manifestly unjust that they should use their office as trustee for their own benefit to the exclusion of the beneficiaries

A trustee must conduct the trust with an eye single to the interests of the cestui que trust and all transactions entered into by him will be presumed to have been entered into for the benefit of the trust estate. A trustee cannot enter into a contract with himself; he cannot purchase of the trust estate or sell to the trust estate. Such transactions and all other transactions by which the trustee is benefited are prima facie voidable at the election of the cestui que trust. If it can be shown that the trustee acted in perfect good faith and the beneficiary refused to refund the benefit that he had received under the transaction, then the beneficiary cannot avoid the transaction. Judge Finch said, in a case in which a director of a corporation dealt in his own behalf in respect to matters involving the trust:-

"The beneficiary may avoid

the act of the trustee but cannot do so without restoring

what he received. To cling to the fruits of the trustee's dealings while seeking to avoid his act; to take the benefit of his loan and yet avoid and reverse its security would be inequitable and unjust. It would turn a rule designed for protection into a weapon of offense and injustice"(a).

As before stated, a trustee cannot at a sale of trust property buy the property either directly or through a third person nor can he sell his own property to the trust estate directly or by means of a third person(c). Such transactions are voidable at the instance of the cestui que trust. But although voidable and although the presumptions are against them, yet if the trustee acted in good faith, making full disclosures to the cestui que trust, taking no unfair advantage, and it can be shown that the bargain was a fair and reasonable one, the presumptions of invalidity will be rebutted(b). The transaction must be beyond suspicion and the burden of proof is upon the trustee to show that the transaction was a perfectly fair and reasonable one. Such transactions are severely scrutinized by courts of Equity and they will set the transaction aside on the least showing of fraud or unfair advantage taken of the cestui que trust.

In *Spensers and Newbolds Appeal*, Mercer J. said :-

"Prima facie the purchase of a trustee from his cestui que trust cannot stand. To sustain it the trustee must have acted in entire good faith. He must show that he made to

the cestui que trust the fullest disclosures of all he knew
(a) *Duncombs N.Y.H and N.R.R.* 84 N.Y.190.

(b) *Perry on Trusts.* #428.

(c) *Romaine v Hendric'sons Executors* 27 N.J.Eq.162.

in regard to the subject matter, and that the price he paid is adequate."(a).

The subject of compensation of trustees will now be considered

The rule in England as to compensation is that a trustee shall receive no compensation, the duty of acting as trustee being considered as one of high honor. The principal reason for this rule is that the trustee should not be placed in a position where his *interest* would be opposed to his duty. But an exception to this rule is made in the cases of trustees for absent owners of estates in the East Indies and mortgagees in possession of estates in Jamaica. In these cases, courts of Chancery have allowed trustees compensation for their services(b) But trustees have a right to be reimbursed all necessary expenses that are incurred in the execution of the trust, and such expenses are a lien upon the trust property and the trustee will not be compelled to part with the property until such expenses have been paid(c) It has further been held that a trustee has a right to be reimbursed any loss that may come to him through the due administration of the estate and a lien upon the estate for that amount(d).

The English rule that a trustee should have no compensation for his services has been followed to a very limited extent in the United States. It was cited and enforced by Judge Kent in two early cases(e) and is followed in Delaware(f) and perhaps in Ohio and

(a). Spensers and Newbold's Appeal 80 Pa. State 317.

(b). Perry on trusts. #905.

(c). Bensselaer v Saratoga R.R. v Miller & Knapp 47 Vt. 146.

(d). Jervis v Wolferstan Law Reports 18 Equity cases 18.

(e). Green v Winter, Johnsons Ch. 37.

(f). Manning v Manning, " 534.

(f). Egbert v Brooks 3 Harrington (Del) 112.

Illinois. In Egbert v Brooks(a) By the Court:-

"A voluntary trustee, not stipulating for compensation, is not entitled to any compensation for time and trouble, he is entitled to have all his expenses and charges paid; to be indemnified against loss but not remunerated".

The general rule prevailing in the United States is that trustees are to be allowed a reasonable compensation for their labor, time and skill in executing the trust, also their necessary expenses incurred in carrying out the trust. There are different rules in the different states as to the method of determining the amount. In some states, it is regulated by statute and in others, by the court to which the trustee accounts. In the majority of the states, the compensation is fixed by a percentage upon the trust fund which percentage varies with the different states. Some States allow a gross sum and others allow a certain sum per day for labor, time, travel etc.

In New York the compensation of executors and administrators is fixed at five per cent. upon the first one thousand dollars, two and one-half per cent upon the next nine thousand dollars and one per cent upon all above those amounts(b) They are also to be allowed their reasonable expenses in addition. It was held in two early cases that this provision applied likewise to trustees(c)

A trustee who is a lawyer cannot charge both for his services as trustee and lawyer. The beneficiary has a right to resort to

(a) Egbert v Brooks 3 Harrington(Del) 112.

State v Platt 4 " 154.

(b) 4th. vol. 8th. edition N.Y. Revised statutes p2565.

(c) Meacham v Sterns 9 Paige 403.

Jewett v Woodward 1 Edwards Ch. 199.

a court of equity for any needed relief but that right may be barred by the acquiescence by the beneficiary in the wrong against which he seeks relief when it is made to appear 1st. that the beneficiary was capable of bringing suit. 2nd. that acquiescence was not the result of undue influence. 3rd. that acquiescence was with full knowledge of the transaction. 4th. that the beneficiary had full knowledge of his legal rights in the matter (a).

Another bar to the bringing of a suit by the cestui que trust, is the statute of limitations i.e when the transaction is between the trustee and cestui que trust on one hand and a stranger on the other hand. (b). But as between the trustee and the cestui que trust, the former cannot shield himself behind the statute of limitations except in a case where there is a balance in the hands of the trustee and the cestui que trust knows it. In such a case the trustee might as a bar to the recovery, set up the statute of limitations.

Courts of equity will sometimes refuse to allow suits to be brought on the ground that stale claims should not be investigated, even though the statute of limitations has not run and presumptions cannot arise by lapse of time (c). Mr Perry also gives as a bar to a suit by the cestui que trust in equity after the lapse of considerable time, the presumption of something done, which if done, is an answer to plaintiff's suit. (d).

A court of equity has power to remove a trustee whenever the court deems it proper that he should be removed, but this power can

(a) 11 Pomeroy's equity Jurisprudence #964 and 965.

(b) Perry on trusts #858

(c) Price's appeal 54 Pa St 472.

(d) Perry on trusts #866.

only be exercised by the Court in accordance with sound judicial discretion. Whenever the trustee so conducts himself as to render it improper or detrimental to the trust estate that he should continue his duties as trustee, the court will remove him. A court of equity has also the power of appointment and if a trustee dies or resigns, another will be appointed by the court to take his place but this power, as in the power of removal, can only be exercised by the court with great discretion. Upon the determination of the trust which may be either by the accomplishment of the purposes for which the trust was created, or by agreement of all parties interested in the trust, giving their consent "sui juris", the trustee must turn over the trust property to the persons entitled to it. He must turn the property over either in accordance with the trust instrument or legal rules, and to do this, he must execute all the proper conveyances. If the person or persons entitled to the property, are laboring under any disability the property should only be turned over to him ^{or them} in accordance with an order of the court. In all other cases, the trustee may settle with the cestui que trust immediately. If the trustee should refuse to turn over the property at the determination, he can be compelled to do so by a suit in equity, and if the trustee then refuses to obey that order of the court, he can be punished for contempt.(a).

For the violation of a trust a trustee always incurs a personal liability, and may be compelled to render compensation to the cestui que trust for a breach of the trust. If the breach of trust

(a)11 Pomeroy's Equity Jurisprudence #1080-1081.

is occasioned by several trustees, they are liable jointly and severally; and the beneficiary can enforce the decree against any one of them. (a).

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George M. Spawm.

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